STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 12, 2003
v	No. 234921 Wayne Circuit Court
JAFARI T. MARTIN, Defendant-Appellant.	LC No. 00-011373

Before: Talbot, P.J., and Neff and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), assault with intent to commit murder, MCL 750.83, and first-degree home invasion, MCL 750.110a(2). He was sentenced to concurrent terms of natural life imprisonment for the first-degree murder conviction, life imprisonment for the assault with intent to commit murder conviction, and 13-1/2 to 20 years for the first-degree home invasion conviction. He appeals as of right. We affirm in part, but remand for modification of defendant's sentence for first-degree home invasion to comport with the two-thirds rule.

Defendant's convictions arise from his participation in an incident in which defendant, along with codefendants Harold Shaw and Marcus Walker,[1] broke into a house to steal money. Mary Shakur, her two young children, and her teenage brother were home at the time. Shakur and her four-month-old daughter were both shot during the ordeal. Shakur died from a single gunshot to her forehead, while Shakur's daughter received a nonfatal gunshot wound in the shoulder.

I

On appeal, defendant first argues that the trial court erred by refusing to sever his trial from that of codefendant Shaw.

[1] Defendant was tried jointly with codefendant Shaw, before a single jury. Codefendant Walker was tried separately. *People v Shaw*, Docket No. 234923 and *People v Walker*, Docket No. 237773, have been submitted on appeal with this case.

Defendant failed to appropriately preserve this issue by moving for a separate trial or expressly joining codefendant Shaw's motion for a separate trial. However, the record reflects that both the prosecutor and the trial court acted in a manner consistent with the understanding that defendant was likewise requesting severance, and the court entered an order denying defendant's motion. Thus, we will treat this issue as preserved. See *People v Griffin*, 235 Mich App 27, 41 n 4; 597 NW2d 176 (1999).

Given the absence of record evidence that defendant presented the trial court with specific reasons for a separate trial, independent of those advanced by codefendant Shaw, we resolve this issue in a manner consistent with our resolution of the same issue in codefendant Shaw's companion appeal in Docket No. 234921. In Docket No. 234921, we concluded that the court did not abuse its discretion in denying Shaw's motion for separate trials. 6.121(D); *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994). Severance was not mandatory because Shaw failed to provide the court with any supporting affidavit[2] or offer of proof that clearly, affirmatively, and fully demonstrated that his substantial rights would be prejudiced by a joint trial, and that severance was the necessary means of rectifying the potential prejudice. MCR 6.121(C); *Hana, supra*.

In this case, defendant did not make an offer of proof below or on appeal that severance was warranted because Shaw's custodial statement was mutually exclusive with defendant's "alibi defense." We have found no notice of alibi filed by defendant in the lower court record. Moreover, defendant only cursorily argues on appeal that codefendant Shaw's custodial statement was improperly admitted against him at the joint trial. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Moreover, while a risk of prejudice might arise if evidence that a jury should not consider against a codefendant would be admissible at a joint trial, speculation regarding evidentiary matters, such as whether a codefendant would exercise his right not to testify, is not an appropriate bases for severance. *Hana, supra* at 346 n 7, 361-362.

We note that defendant did not object to the manner in which codefendant Shaw's statement was introduced and he did not seek a limiting instruction relative to that statement. The fact that defendant's custodial and testimonial statements differed from codefendant Shaw's statement weighs in favor of finding that any error was harmless. See *Cruz v New York*, 481 US 186, 192-194; 107 S Ct 1714; 95 L Ed 2d 162 (1987).

II

Defendant next argues that the trial court gave an erroneous instruction regarding the malice element for both felony murder and second-degree murder. Because defendant did not object to the challenged instruction at trial, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

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[2] The affidavit that Shaw filed in the lower court record was not signed or notarized.

Both second-degree murder and felony murder require proof of the actor's malice. *People v Aaron*, 409 Mich 672, 728; 299 NW2d 304 (1980). Malice has been defined as (1) the intention to kill, (2) the intention to do great bodily harm, or (3) "the wanton and willful disregard of the likelihood that the natural tendency of the defendant's behavior is to cause death or great bodily harm." *Id.* Under another formation of the third form of malice, the actor must have the "intent to create a very high risk of death or great bodily harm, with the knowledge that death or great bodily harm is the probable result." *People v Dykhouse*, 418 Mich 488, 495; 345 NW2d 150 (1984). Defendant argues that the trial court failed to define that variation of the third formulation of the intent necessary for felony murder and second-degree murder. We conclude that defendant has not shown plain error. Defendant's proposed instruction is not a necessary formulation of the depraved-heart form of malice. *People v Goecke,* 457 Mich 442, 466-467; 579 NW2d 868 (1998). One means of expressing this concept is the "wanton and wilful disregard of the likelihood that the natural tendency of a defendant's behavior is to cause death or great bodily harm." *Id.* at 466. Here, the court's instruction reflects that it followed the latter means of conceptualizing the depraved-heart form of malice, with the exception that it used the broader phrase "total disregard." Examined in context, the jury would not have been misled into believing that it could find malice based on unintentional acts. Hence, while the court's instruction was not perfect, defendant has not shown plain error relative to the depraved-heart form of malice. *Carines, supra* at 763.

We further note that the specific instruction challenged by defendant on appeal was directed at the requisite malice for the actual perpetrator of the killing. The depraved-heart form of malice was not decisive to whether the actual perpetrator had the requisite malice because there was overwhelming evidence that the actual perpetrator acted with an intent to kill when he shot Shakur in the forehead. The trial court gave a separate instruction with regard to the requisite intent for an aider and abettor to felony murder, which defendant does not challenge. Therefore, this issue does not warrant appellate relief.

III

Defendant next argues that the trial court erroneously instructed the jury regarding the concept of reasonable doubt. Specifically, the court instructed:

> Now, a reasonable doubt means exactly what the words imply. A doubt for which you can assign a reason for having.
>
> Now, a reasonable doubt is not a vain or a flimsy, or fictitious, or a possibility of innocence. It is a fair and honest and reasonable doubt. A doubt for which you can assign a reason.

The issue is not preserved because defendant failed to object to this instruction at trial. Therefore, defendant must show plain instructional error. *Carines, supra* at 763. Although the court's instruction did not conform precisely to the standard jury instruction on reasonable doubt, CJI2d 3.2(3), trial courts are not required to use the Michigan Criminal Jury Instructions, which do not have the official sanction of the Michigan Supreme Court. *People v McFall*, 224 Mich App 403, 414; 569 NW2d 828 (1997). To pass scrutiny, a reasonable doubt instruction, read in its entirely, must leave no doubt that the jury understood that the burden was placed on the

prosecutor and what constitutes reasonable doubt. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

Here, the trial court's use of the phrase "doubt for which you can assign a reason" is problematic because, examined in isolation, it might be construed as shifting the burden of proof. An instruction defining reasonable doubt may not require that jurors have a reason to doubt a defendant's guilt. *People v Jackson*, 167 Mich App 388, 391; 421 NW2d 697 (1988). However, other instructions left no doubt that the burden of proof rested with the prosecutor. The jury was instructed that "[i]t is the burden of the Prosecutor to prove to you, beyond a reasonable doubt, that the crimes alleged were in fact committed" and that "[t]here is no burden on the defendant in the criminal case to do anything." Examined in their entirety, the instructions do not convey a message that the jury must have a reason to doubt defendant's guilt, but rather, fairly convey a message that the jury must have reason to doubt defendant's innocence. Accordingly, we reject defendant's claim that the instruction improperly shifted the burden of proof.

Examining the jury instructions in their entirety, we find no basis for defendant's claim that the challenged instruction improperly removed the jury's power of leniency. The power of leniency is a de facto power with regard to which the jury is not instructed. *People v Torres (On Remand)*, 222 Mich App 411, 420; 564 NW2d 149 (1997). Further, we reject defendant's argument that the trial court improperly instructed the jury to bring back a guilty verdict if the prosecution proved its case. Unlike *People v Ward*, 381 Mich 624, 627-628; 166 NW2d 451 (1969), the court in this case did not comment on the evidence. Rather, it gave a balanced instruction concerning the jury's duties with regard to both an acquittal and conviction. It is not improper for a court to explain what jurors would do if they were true to their oaths and performed their legal duty. *People v Reichert*, 433 Mich 359, 363-362; 445 NW2d 793 (1989). Therefore, defendant failed to show plain error that affected substantial rights. *Carines, supra*.

IV

Defendant next argues that the evidence was insufficient to establish that he aided and abetted either a felony murder or assault with intent to commit murder. We disagree.

"[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The prosecutor need not negate every reasonable theory consistent with innocence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The prosecutor need only prove the elements of the crime beyond a reasonable doubt in the face of whatever contradictory evidence a defendant may provide. *Id*.

A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense. *People v Izarraras-Placante*, 246 Mich App 490, 495; 633 NW2d 18 (2001). "Aiding and abetting" includes "all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime." *Carines, supra* at 770. The requisite intent for a conviction as an aider and abettor is that necessary to be convicted as a principal. *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001).

The essential elements of felony murder are (1) the killing of a person, (2) with malice, (3) while committing or attempting to commit, or assisting in the commission of an offense enumerated in the statute, MCL 750.316(1)(b). *Carines, supra* at 758-759. Malice is "the intention to kill, the intention to do great bodily harm, or the wanton and willful disregard of the likelihood that the natural tendency of the defendant's behavior is to cause death or great bodily harm." *Aaron, supra* at 728. "[I]f the aider and abettor participates in a crime with knowledge of his principal's intent to kill or to cause great bodily harm, he is acting with 'wanton and willful disregard' sufficient to support a finding of malice under *Aaron.*" *People v Kelly,* 423 Mich 261, 278-279; 378 NW2d 365 (1985). The essential elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v McRunels,* 237 Mich App 168, 181; 603 NW2d 95 (1999). Circumstantial evidence and reasonable inferences arising therefrom can constitute satisfactory proof of the elements of a crime. *Id.* Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *Id.*

We reject defendant's claim that the evidence established that he was merely present at the scene of the shooting. Viewed most favorably to the prosecution, the evidence supported a reasonable inference that defendant was the source of information about money and potential persons inside the house where Shakur resided with her boyfriend, Lawrence Northern, and their two children. The evidence indicated that defendant had worked for Northern, had visited Northern's home, and had observed Northern flash money in the past. Further, the testimony of the prosecutor's witness, David Harrison, if believed, was sufficient to place defendant with his codefendants in Harrison's minivan that was parked outside of Shakur's home immediately before the shooting. Also, Harrison testified that he saw codefendant Walker wave a pistol and codefendant Shaw display a revolver while Harrison was being told about some "money" and "business" that the men were going to take care of. This supports an inference that defendant was aware of the firearms.

The evidence regarding defendant's own statements to the police, while containing some inconsistencies, indicated that defendant was an active participant in the planning of an unlawful entry into Northern's home to steal money, despite knowledge that persons could be at risk inside the home. In his first statement, defendant also admitted seeing Shaw with a gun. In his second statement, defendant indicated that he waited in the minivan while the codefendants went to the house, and that he heard two gunshots while he was waiting. Other proofs established that Shakur and her four-month-old daughter were shot during the break-in.

Viewed most favorably to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant had the requisite intent and provided the requisite aid or encouragement to be criminally liable as an aider and abettor to the perpetrator of the felony murder of Shakur, and the assault with intent to murder Shakur's daughter. The shootings were foreseeable and within the scope of the main purpose of the conspiracy. *Carines, supra* at 759; *Aaron, supra* at 731.

V

Lastly, although not raised as an issue on appeal, we conclude that defendant's minimum sentence of 13-1/2 years (162 months) for his first-degree home invasion conviction is more than two-thirds the maximum sentence of twenty years (240 months), contrary to MCL 769.34(1)(b).

Pursuant to MCR 7.216(7), we remand for modification of defendant's minimum sentence for first-degree home invasion to its lawful limit of thirteen years and four months (160 months). MCL 769.24; *People v Thomas*, 447 Mich 390, 393-394; 523 NW2d 215 (1994).

Affirmed in part and remanded for modification of defendant's sentence for first-degree home invasion consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Kirsten Frank Kelly